85-2170

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO. 85- _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

IN RE JOSEPH L. DROCIAK

On Appeal from the Supreme Court

of New Hampshire

JURISDICTIONAL STATEMENT

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Chevy Chase, Maryland 20815
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Counsel of Record
Attorney for Appellant
Joseph L. Drociak

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Baltimore, Maryland 21210-1999
(301) 435-4420
Of Counsel

QUESTIONS PRESENTED BY THE APPEAL

Where a nonresident is in all respects qualified for admission to a state's bar and the state has in the past improperly denied him membership in the bar because of his nonresidency, can the state now refuse to admit him to the bar without a hearing simply because the version of the bar examination he passed was not a multistate bar examination of the type presently offered by the state? Does the state's refusal to admit him to the bar under these circumstances constitute a violation of the nonresident's rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment?

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No. _____

In the

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IN RE JOSEPH L. DROCIAK

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of New Hampshire

JURISDICTIONAL STATEMENT

OPINION BELOW

In an unreported decision dated March 28, 1986, the New Hampshire Supreme Court denied appellant admission to the New Hampshire bar. The decision is included in the Appendix as #18.

JURISDICTION

In its unreported decision dated March 28, 1986, the Supreme Court of New Hampshire denied appellant's admission to the New Hampshire bar. App. #18. The decision was based on a written Statement of Policy of the State of New Hampshire regarding nonresident applicants. This policy was adopted subsequent to the decision in Supreme Court of New Hampshire v. Piper, 470 U.S. _, 84 L. Ed. 2d 205 (decided March 4, 1985) which held that New Hampshire's bar residency requirement was violative of the Privileges and Immunities Clause of the Federal Constitution.

Under this new policy, New Hampshire will only admit to the bar individuals who took the examination since July, 1973, when New Hampshire began using the multistate bar examination. The court refused to admit Mr. Drociak because he passed an earlier version of the bar examination. Further, it refused his request for a hearing on the matter.

The basis for jurisdiction is 28 U.S.C. Section 1257 (2) which gives this Court jurisdiction to review the validity of a statute of any state on the ground of its repugnance to the Constitution of the United States. Here, the policy noted above is being administered under New Hampshire Revised Statutes, Chapter 311, in a manner that violates

appellant's right to due process of law and equal protection of the law under the Fourteenth Amendment.

The Notice of Appeal was filed on June 18, 1986 in the Supreme Court of New Hampshire. App. #19.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Admendment of the United States Constitution states in pertinent part: "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. Section 1257(2) states in pertinent part that "final judgments or decrees rendered by the highest court of a State ... may be reviewed by the Supreme Court ... [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution ... of the United States ..."

New Hampshire Revised Statutes, Chapter 311, deals generally with bar admission in the State of New Hampshire. Pursuant to the authority over bar admission provided generally by this statute, the New Hampshire Supreme Court has instituted a written "Statement of Policy" which is being challenged here. This Statement of Policy, contained in

the Appendix #17, provides that nonresident applicants for admission to the bar will be admitted only if they passed a New Hampshire bar examination "comparable in form and content to the present examinations, i.e., bar examinations given on July 25 and 26, 1973, or thereafter."

STATEMENT OF THE CASE

1. Mr. Drociak was born and raised in Manchester, New Hampshire. He went to both high school and college there.

2. After attending law school in Washington, D.C. at the Georgetown University Law Center, he returned to his

home in New Hampshire in about June, 1961 to study for the New Hampshire bar examination. He took and passed the examination in the summer of 1961.

3. In about July, 1961, he went to California, where he became a member of the California bar and continued to reside.

4. Mr. Drociak applied to be sworn into the New Hampshire bar in 1962, 1977, and 1979, but each time was informed by the New Hampshire Supreme Court that nonresidents could not be admitted.

5. Around 1980, the Court issued a new policy in amending New Hampshire Supreme Court Rule 42 to provide that one must take the oath of office within two

years of passing the bar examination (hereinafter, the "Two Year Requirement"), lest he be required to retake the examination.

6. Mr. Drociak filed a Notice of Appeal of the New Hampshire Supreme Court's prior rulings to the United States Supreme Court on November 13, 1980. Mr. Drociak contended that the residency requirement violated the Privileges and Immunities Clause and his rights to equal protection and due process under the Fourteenth Amendment of the U. S. Constitution.

7. The United States Supreme Court did not give plenary consideration to Mr. Drociak's appeal, but shortly thereafter heard the case of S. Ct. of New

Hampshire v. Piper, 470 US _, 84 L. Ed 2d 205, (decided March 4, 1985) which was based on similar facts. The Piper case held the New Hampshire bar residency requirement violative of the Privileges and Immunities Clause of the U.S. Constitution.

8. Shortly after the Piper decision, Mr. Drociak sent the New Hampshire Supreme Court a letter dated March 14, 1985, again requesting to take the oath to be admitted to the New Hampshire bar. (Appendix, #14)

9. By letter dated March 22, 1985, the New Hampshire Supreme Court Clerk's Office notified Mr. Drociak that it did not know whether he would need to retake the bar examination in order to be

admitted since more than two years had elapsed between passing the bar examination and his most recent request to take the oath of admission.

10. On March 28, 1985 the New Hampshire Supreme Court amended its Rule 42 to delete the bar residency requirement in accordance with the Piper decision.

11. On April 24, 1985, Mr. Drociak again wrote the Court and noted that his prior requests for admission in 1962, 1977, and 1979 all predated the 1980 Two Year Requirement. To apply it to him at this time would be unjust. (Appendix, #15)

12. By letter of May 27, 1985, Clerk Ralph H. Wood enclosed a new written "Statement of Policy" dated May 13, 1985, adopted in light of the Piper decision. The policy allowed bar applicants who had taken the bar examinations in July 1973 and thereafter, and who had previously been denied admission solely because of the residency requirement, to apply for admission without having to retake the bar examination. The gist of the policy was that nonresidents who had passed the multistate bar examination, offered in New Hampshire since 1973, could be admitted. Nonresidents who had passed the New Hampshire bar examination prior to 1973, like Mr. Drociak, would not be

admitted. (Appendix, #16 & 17)

13. On December 11, 1985, Mr. Drociak filed a motion with the New Hampshire Supreme Court which argued that refusal to admit him denied him due process of law and equal protection of the law in violation of the Fourteenth Amendment. These are the same grounds raised here in the United States Supreme Court.

In addition to making the foregoing arguments, Mr. Drociak requested a hearing on his application for admission.

14. Without providing a hearing, the Supreme Court of New Hampshire issued a decision dated March 28, 1986 denying Mr. Drociak's motion for admission to

the bar. (Appendix, #18) The decision stated that the reason for the July, 1973 cut-off was because "the nature of the examination changed at that time, when the multi-state examination was first required, and because this Court concluded that competency to practice law was better measured by examinations given after that date."

15. On June 18, 1986, Mr. Drociak filed a Notice of Appeal with the New Hampshire Supreme Court. (Appendix, #19)

STATEMENT OF REASONS WHY PLENARY CONSIDERATION IS REQUIRED

Introduction

When this Court struck down New Hampshire's residency requirement for bar

admission as unconstitutional in Supreme Court of New Hampshire v. Piper, 470 U.S. _, 84 L. Ed. 2d 205 (decided March 4, 1985), it intended that individuals who were denied admission to the New Hampshire bar because of nonresidence would be admitted to the bar. Contrary to this, the New Hampshire Supreme Court has now adopted a formal written Statement of Policy under which it refuses to admit to its bar nonresidents who passed the bar examination prior to July, 1973. In July, 1973, the multistate bar examination was introduced into the state. A copy of the New Hampshire Supreme Court's written policy is included in the Appendix as #17.

Because of the New Hampshire policy, which is administered under the state statute governing bar admission, New Hampshire Revised Statutes, Chapter 311, Mr. Drociak is now being denied an opportunity to practice law in the state. The sole reason for this denial is that he had the misfortune of passing a bar examination dealing with New Hampshire law rather than multistate principles.

Plenary consideration is required because the New Hampshire Supreme Court has failed, in Mr. Drociak's case, to carry out the United States Supreme Court's ruling in the Piper case. Having chosen to apply Piper retroactively, the New Hampshire Court then improperly failed to include Mr. Drociak in the

group of nonresidents eligible to be sworn into the bar. This case furnishes the Supreme Court with an opportunity to declare that once a state makes nonresidents eligible for bar admission retroactively from the date of the Piper decision, all qualified nonresidents must be admitted to the bar.

NEW HAMPSHIRE'S REFUSAL TO ADMIT MR. DROCIAK TO THE BAR VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

I. The New Hampshire Supreme Court's Decision Violated The Equal Protection and Due Process Clauses Because There Is No Rational Basis For Concluding That Mr. Drociak Is Unqualified To Practice Law In New Hampshire

The Equal Protection Clause of the Fourteenth Amendment commands that no

State shall "deny to any person within its jurisdiction the equal protection of the laws," which is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. _, 87 L. Ed. 2d 313 (Decided July 1, 1985). State actions are subject to strict scrutiny by the courts when they impinge on personal rights protected by the Constitution. Cleburne, supra; Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969).

The right to practice law is a personal right protected by the Privileges and Immunities Clause. Supreme Court of New Hampshire v. Piper, 470 U.S. __, 84 L. Ed. 2d 205, 213

(Decided March 4, 1985). As a result, it follows that a decision to deny admission to the bar is subject to strict scrutiny by the courts.

New Hampshire has provided no rational basis for its decision determining Mr. Drociak unqualified for bar admission. As a result, Mr. Drociak has been denied equal protection and due process of law under the principles established in Konigsberg v. State Bar of California, 353 U.S. 252, 262 (1957). The Konigsberg decision held it to be a denial of equal protection and due process to refuse to admit someone to the bar where "there was no basis for the finding that he failed to meet the

qualifications which the State demands of a person seeking to become a lawyer."

The Supreme Court of New Hampshire contended in its opinion below that the multistate bar examination better measures competency to practice law than the examination taken by Mr. Drociak. Appendix #18. No evidence is given to support this claim. It is simply an arbitrary conclusion reached by the Court. There is no justification for the Court's conclusion that the multistate bar examination better measures competency to practice law in New Hampshire than the bar examination oriented toward New Hampshire law passed by Mr. Drociak. Since the court's reason for not admitting Mr. Drociak to

the bar does not have a "rational connection with the applicant's fitness or capacity to practice law," the court's action violates Mr. Drociak's right to due process of law and equal protection. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

The arbitrariness of the Court's ruling may be illustrated by the fact that it is highly likely that the members of the New Hampshire Supreme Court passed bar examinations oriented toward New Hampshire state law rather than a multistate examination. Yet they would seek to bar Mr. Drociak from being sworn into the bar on the basis that the examination he passed does not measure

professional competency as well as the multistate examination.

II. The New Hampshire Supreme Court's Failure to Give Mr. Drociak A Hearing Violated His Right to Due Process of Law

Mr. Drociak's right to due process of law was violated since the court below refused to grant his request for a hearing on his bar admission. In Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), it was held that a petitioner for membership in the bar was denied due process of law where he was denied admission without a hearing. The United States Supreme Court emphasized, "the requirements of procedural due process must be met before a State can

exclude a person from practicing law." Willner, supra, at 102. The right to practice law was held to be not "a matter of grace and favor." Willner, supra.

III. New Hampshire's Legitimate Concern For The Competency Of Its Bar May Be Carried Out By Measures Other Than The Arbitrary Measure Employed Here

The Supreme Court of New Hampshire has a legitimate concern for the competency of its bar. However, this Court has repeatedly stressed that states are able to carry out this objective by the monitoring of attorneys' professional conduct after admission to the bar. For example, in In re Griffiths, 413 U.S. 717, 726-27 (1973), this Court observed "once admitted to the bar, lawyers are

subject to continuing scrutiny by the organized bar and the courts. In addition to discipline for unprofessional conduct, the range of post admission sanctions extends from judgments for contempt to criminal prosecutions and disbarments." Once Mr. Drociak is admitted to the bar, there will be adequate scrutiny of his professional competency by fellow members of the bar and the courts.

Further, New Hampshire does not dispute that Mr. Drociak has been practicing competently as a member of the California bar for many years. The state has provided no rational basis for questioning whether Mr. Drociak would be

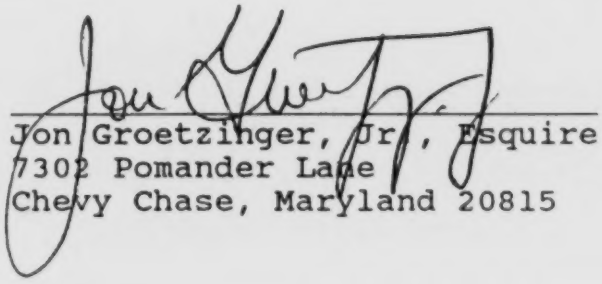
a competent member of the New Hampshire bar.

CONCLUSION

The New Hampshire Supreme Court has denied Mr. Drociak an opportunity to practice law in his native state. This is a matter of much gravity.

In so acting, the New Hampshire Supreme Court has violated Mr. Drociak's rights to equal protection of the laws and due process of law under the Fourteenth Amendment. This case raises an important issue regarding the retroactive application of this Court's

Piper decision.* As a result, the question presented here requires plenary consideration.



Jon Groetzinger, Jr., Esquire
7302 Pomander Lane
Chevy Chase, Maryland 20815

* The case of District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) leaves appellant unclear as to whether he should directly appeal to this Court or file an action instead in the United States District Court for the District of New Hampshire. If this Court concludes that Mr. Drociak properly belongs in the District Court, it is requested that this Court defer noting probable jurisdiction.

APPENDIX

N.H. SUPREME COURT ORDERS [LETTERS] ON APPEAL:

#1

[Letterhead of Clerk of N.H. Supr. Court]

1962

May 21

Mr. Joseph L. Drociak

2325 Ocean View Avenue

Los Angeles 57, California

Dear Mr. Drociak:

In accordance with our telephone conversation of May 11, 1962, you may be admitted to the bar of this state when the Court next convenes in regular sessions, June 5, at 10 A.M., provided you are a bona fide resident of this state on that date.

On the question of residence, this office has a communication dated May 16,

1962 from the Assistant Secretary of the Committee of Bar Examiners for the State Bar of California, disclosing that you informed that Committee that "After graduation from law school I came to California and have taken permanent employment as a claims representative with the Aetna Ins. Co. Have also rented an apartment and have given up N.H. residence."

You have informed me in your telephone conversation that you have continued to maintain your domicile in New Hampshire and that you presently have a domicile here.

Will you kindly explain by return air mail this apparent conflict on the question of your bona fide intention of

making New Hampshire your home.

Very truly yours,

[George O. Shovan]

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#2

[Letterhead of N.H. Supr. Court]

1977

September 16

Joseph L. Drociak, Esq.

7627 South Western Avenue

Los Angeles, California 90047

Dear Mr. Drociak:

Your request by letter dated "September 197[illegible] that you be admitted to the New Hampshire bar by reason of having passed the New Hampshire bar examination in 1961 has been denied.

Very truly yours,

[George S. Pappagianis]

George S. Pappagianis

GSP/drc

****

#3

STATE OF NEW HAMPSHIRE

SUPREME COURT OF NEW HAMPSHIRE

In re Petitions for Admission to the New Hampshire Bar on Motion

On June 3, 1977, the Supreme Court of New Hampshire established a Committee on Character and Fitness and prescribed that each petitioner for admission to the bar must pay one hundred dollars ($100) for the Committe[e]'s use in its investigation of the petitioner's character and fitness.

All petitions for admission on

motion filed since June 3, 1977, will be considered and acted upon by the court next year, probably in late summer or early fall.

The sum of the fees payable to this office by a petitioner for admission on motion is $375, of which $250 is retained by the state and $125 is forwarded to the National Conference of Bar Examiners.

A new petition-for-admission-on-motion form and a questionnaire are being processed for final review. Your name and address are being retained in our files as one who is to receive the new form, the questionnaire, and any other pertinent material, and we will send them to you as soon as they are available.

****

#4

[Letterhead of N.H. Supr. Court]

May 2, 1980

Jon Groetziner, Jr., Esq.

1 North Main Street

Derry, N. H. 03038

Michael G. Gfroerer, Esq.

Barto and Gfroerer

6 Loudon Road

P. O. Box 468

Concord, N.H. 03301

Re: 79-323 In re Joseph L. Drociak

Gentlemen:

The Court does not approve requests to take the oath of admission where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath.

The Court is reviewing its policy on admission on motion to the Bar.

Should Mr. Drociak desire to become admitted by taking the bar examination this summer, the Court will permit him to apply as late as May 30, 1980. Enclosed is a bar examination application, together with an information sheet. The fee for the Character and Fitness investigation will be waived, but the exam fee of $75. must be submitted at the time his application is filed.

Sincerely,

[Ralph H. Wood]

Ralph H. Wood

rhw/cab

Enclosure

****

#5

[Letterhead of N.H. Supr. Court]

. 1980

June 13

Jon Groetzinger, Jr., Esq.

100 Federal Street

Boston, MA 02110

Michael G. Gfroerer, Esq.

Barto and Gfroerer

6 Loudon Road, P.O. Box 468

Concord, NH 03301

Re: No. 79-323 In re Joseph L. Drociak

Gentlemen:

This will respond to your "Motion" dated May 20, 1980. My letter of May 2, 1980 was the equivalent of an order of the court. It was not based upon the recent change to Rule 42 but rather upon

past practice of the court in requiring re-examination whenever several years have passed following the taking of the examination without the applicant's having established residency and taken the oath.

Very truly yours,

[Ralph H. Wood]

Ralph H. Wood

RHW/jd

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#6

[Letterhead of the N.H. Supr. Court]

August 21, 1980

Jon Groetzinger, Jr., Esq.

100 Federal Street

Boston, Massachusetts 02110

Re: 79-323 In re Joseph L. Drociak

Dear Mr. Groetzinger:

The Court has instructed me to inform you that it has reviewed the contents of your letter of June 20, 1980 addressed to the Clerk and that it intends to take no further action in this matter.

Very truly yours,

[Ralph H. Wood]

Ralph H. Wood

rhw/cab

cc: Michael G. Gfroerer, Esquire

****

NOTICE OF APPEAL:

#7

In the Supreme Court of the

State of New Hampshire

In re Joseph L. Drociak No. 79-323

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

Notice is hereby given that Joseph L. Drociak, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final decree of the Supreme Court of the State of New Hampshire, dismissing his motions to be admitted to the New Hampshire Bar, entered on August 21, 1980, and all prior orders relating to the appellant.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

[Jon Groetzinger, Jr.]

Jon Groetzinger, Jr.

and

Michael G. Gfroerer

Counsel for Appellant

****

In the Supreme Court of the

State of New Hampshire

In re Joseph L. Drociak No. 79-323

PROOF OF SERVICE AND

NOTARIZED STATEMENT OF MAILING

I hereby certify that an original of appellant's Notice of Appeal To The Supreme Court of The United States was mailed by certified first class mail, postage prepaid, return receipt requested, by me to the Clerk of the Supreme Court of the State of New Hampshire on this 13th day of November, 1980, at the main U.S. Post Office in Post Office Square, Boston, MA.

I further certify that three copies of said Notice and three copies of this

Proof of Service were mailed by certified first class mail, postage prepaid, return receipt requested, by me to the Office of the New Hampshire Attorney General, State House Annex, Concord, N.H. 03301 on this 13th day of November, 1980, at the main U.S. Post Office in Post Office Square, Boston, MA.

To my knowledge said mailings took place within the permitted time, in compliance with U.S. Supreme Court Rules, and were served upon all parties.

[Jon Groetzinger, Jr.]

Jon Groetzinger, Jr.
100 Federal Street
Boston, MA 02110
(617) 426-3904

[Oath, notary signature and seal]

****

OTHER MATERIAL:

#8

Clerk's Affidavit:

AFFIDAVIT

State of New Hampshire)

County of Merrimack) ss:

I, George O. Shovan, being duly sworn, depose and say that:

1. I currently reside on Little Sunapee Road in New London, New Hampshire.

2. I was Clerk of the New Hampshire Supreme Court from May 1, 1933 until February 1, 1970.

3. As Clerk I was responsible for receiving petitions for admission to the bar examination and received one such

petition from Joseph L. Drociak on May 11, 1961. Mr. Drociak's petition stated that he was residing at 315 Manchester Street, Manchester, New Hampshire.

4. On May 15, 1961 I wrote to Mr. Drociak informing him that his application had been approved by the Court, subject to his furnishing a certificate of graduation from law school which he subsequently supplied.

5. Mr. Drociak took the New Hampshire bar examination on June 21, 22, and 23, 1961 and successfully passed.

6. During a telephone conversation on or about December 4, 1978 with Jon Groetzinger, Jr., Mr. Drociak's attorney, he stated that his client had told him the following, to the effect that:

While in California in August, 1961, Mr. Drociak learned that he had passed the New Hampshire bar examination and telephoned me soon after at the Clerk's office. During the conversation he stated that he was in California and, lacking funds, would find it difficult to return to New Hampshire in time for the August 30, 1961 swearing in ceremony. Thereupon, I told him not to worry, that he could return and be sworn in at any time in the future and that there was no time limit on this right to be sworn in.

7. While I do not remember the specific telephone call from Mr. Drociak, I often received such calls from examinees who had passed the bar examination but who had gone off on a

vacation, honeymoon or into the service and were consequently unable to be present to take the oath on the appointed day. I would tell such persons in effect that their absence from a particular swearing in ceremony did not disqualify them from subsequently taking the oath on the first Tuesday of each month, and that there was no time limit within which to take the oath. I often indicated there was a two-pronged test for admission: 1) qualification (i.e. passing the bar examination) and 2) New Hampshire "citizenship" (this statutory language has been interpreted to mean "residency"). If one was not a New Hampshire resident on the date he or she applied to take the examination, the

Court would allow the person to graduate from law school and establish a bona fide residency in New Hampshire. New Hampshire residency must exist on the date the oath was taken. Therefore, were Mr. Drociak currently to become a New Hampshire resident, he could take the oath and be admitted.

8. On August 28, 1961 I wrote to Mr. Drociak informing him as to much of the above, specifically stating in part that:

"if you are unable to be present at that time [i.e. August 30, 1961 at 10 A.M.] you may upon notice to this office be admitted on the first Tuesday of each month at 10 A.M. when the Court holds its regular sessions, provided you are a bona

fide resident of this state when you present yourself for admission."

9. Subsequently in a letter to the California Committee of Bar Examiners, dated December 12, 1961, I stated that Mr. Drociak had not yet been admitted to the New Hampshire bar "for the only reason that he has not qualified as a bona fide resident of this state."

10. On May 21, 1962 I wrote a letter to Mr. Drociak confirming a May 11, 1962 telephone conversation which I had had with him. In the letter I stated that he may be admitted to the New Hampshire bar on June 5, 1962 at 10 A.M.

"provided you are a bona fide resident of this state on that date."

11. In letters dated May 22, 1962

and August 7, 1962 respectively, I informed the California Committee of Bar Examiners that Mr. Drociak maintained a domicile in Manchester, New Hampshire, but was currently a California resident, thereby distinguishing between domicile and residence.

12. This Affidavit is made in conjunction with Mr. Drociak's attempts to be admitted to the New Hampshire bar. Copies of correspondence referred to herein are attached hereto as an exhibit.

[George O. Shovan]

George O. Shovan, Deponent

[Oath and Notary signature and seal - January 16, 1979]

****

Appellant's Requests for Admission

to the Bar:

#9

2325 Ocean View Ave.

Los Angeles 57, Calif.

May 14, 1962

State of New Hampshire

Supreme Court

Concord, New Hampshire

Dear Mr. Shovan:

Confirming our recent telephone conversation please be advised that I was a successful candidate on the 1961 New Hampshire Bar Examination, however due to my location as a claim representative of the Aetna Casualty & Surety Co. I was unable to be present to take the oath for admission to the Bar.

I am returning to New Hampshire on June 1, and respectfully request that I be permitted to take the oath on [T]uesday, June 5 in open court when the court holds it[']s regular session.

I am a native of Manchester and a domiciliary of New Hampshire having resided in Washington, D.C. while in attendance at Georgetown Law Center and in Los Angeles, Calif. while employed as a claim representative for the Aetna Casualty & Surety Co. I am a registered voter in New Hampshire and have a joint interest in real property located in Manchester.

If any additional information is necessary, please advise.

Thanking you for your cooperation in

this matter.

Sincerely yours,

[Joseph L. Drociak]

Joseph L. Drociak

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#10

2325 Ocean View Ave.

Los Angeles 57, Calif.

May 31, 1962

Mr. George C. Shovan

State of New Hampshire Supreme Court

Concord, New Hampshire

Dear Mr. Shovan:

As per our recent telephone conversation, this is to inform you that I shall not be present on June 5 to take the oath as due to my present location I would not qualify as a bona fide resident

of New Hampshire at that time.

Thanking you for your cooperation in this matter.

Sincerely,

[Joseph L. Drociak]

Joseph L. Drociak

****

#11

September 1977

Clerk of the Supreme Court

of New Hampshire

Noble Drive

Concord, New Hampshire 03301

Gentlemen:

Pursuant to our recent telephone conversation please be advised that I am a native of Manchester and a graduate of the Georgetown Law Center in Washington,

D.C. I received my Law degree in June 1961. I successfully completed the New Hampshire State Bar exam in June 1961, however, I was not present that year to be sworn in as a member of the New Hampshire Bar. I discussed this matter at that time with the Clerk of the Supreme Court and was advised that I could be admitted at any time and there was not Statute of Limitation or other bar to my admission.

Relying on that representation, I did not return to New Hampshire to be admitted. Subsequently I took the California Bar examination which I successfully completed and was duly admitted to practice before the California Bar in 1964.

Since that time I have been actively engaged in the practice of Law in Los Angeles. However, I do return to New Hampshire periodically to visit family and friends and would at this time like to be admitted to the New Hampshire Bar and hereby request that I be allowed to take the oath so that I can practice law in my home state.

Respectfully submitted,

JOSEPH L. DROCIAK

Attorney at Law

****

#12

September 23, 1977

George S. Pappagianis

Clerk of Court and

Reporter of Decisions

The State of New Hampshire Supreme Court

Supreme Court Building

Concord, N.H. 03301

Dear Mr. Pappagianis:

Thank you for yours of September 16, 1977. Would you please inform me on what grounds my request for admission to the New Hampshire Bar was denied, and what measures I would have to take in order to be admitted.

Very truly yours,

JOSEPH L. DROCIAK

Attorney at Law

JLD/at

****

Relevant Letters:

#13

[Letterhead of Jon Groetzinger, Jr.]

June 20, 1980

Ralph H. Wood, Clerk

New Hampshire Supreme Court

Supreme Court Building

Concord, NH 03301

Re: In re Joseph L. Drociak

No. 79-323

Dear Mr. Wood:

As you suggested in a telephone conversation of June 16th, we are writing to elaborate on petitioner's reasons for requesting consideration by the Court of its decision in the above-captioned matter. You indicated that such elaboration could be submitted in letter form. We therefore request that the content of this letter be incorporated by reference in and as a part of

petitioner's filings to date.

Petitioner had requested a hearing prior to being denied admission to the bar if there were any facts in dispute. Willner v. Committee on Character and Fitness, 373 US 96, 10 L ed 2d 224 (1963). The facts, however, do not appear to be in dispute and petitioner would be agreeable to submitting a Stipulation of Facts if the Court were to allow him to do so. Petitioner seeks such a stipulation or, if necessary, a hearing to establish a record and findings of fact for the purpose of taking an appeal to the U.S. Supreme Court. He has decided to take the appeal only after lengthy discussions and research. The method of stipulating to

facts has been used in appeals in similar situations. Equitable Life Assur. Soc. v. Commissioner, 321 US 560, 561, 88 L ed 927, 929, reh den 322 US 767, 88 L ed 1593 (1944); Wilson v. Wilson, 416 F Supp 984, aff'd 430 US 925 (1977).

The grounds upon which petitioner intends to seek an appeal include, but are not limited to, the following:

I. Residency Requirement.

A. Constitutionality of Statute and Rules.

As stated in the Supplementary Memorandum of Law, petitioner challenges the constitutionality of the residency requirement for admission to the New Hampshire bar contained in RSA 311:2 and rules issued pursuant thereto as

violative of the Privileges and Immunities Clause of the U.S. Constitution, Art. IV, sec. 2, cl. 1. The constitutionality of such requirement under Art. IV is very much in question at present. The New York Court of Appeals recently held its residency requirement violative of the Privileges and Immunities Clause. Matter of Gordon, 48 NY 2d 266, 397 NE 2d 1390 (1979). However, on May 29, 1980 Judge Doyle of the Wisconsin Federal District Court disagreed with the New York decision and upheld Wisconsin's residency requirements against a Privileges and Immunities challenge, based upon Wilson v. Wilson, 416 F Supp 984, aff'd 430 US 925 (1977). Canfield v. Wisconsin Board of Attorneys

Professional Competence, 48 USLW 2793 (June 10, 1980). See also Golden v. State Board of Law Examiners, 452 F Supp 1082, 1093 (USDC Md 1978) for a similar holding.

B. Unconstitutional Application of Statute and Rules.

Even if the statute and rules themselves do not infringe upon the Privileges and Immunities clause, the manner in which they were applied to petitioner unconstitutionally deprived him of equal protection and due process of law under the federal constitution. The statute and rules only require New Hampshire residency on application to the bar examination, not on the date one is sworn in. Petitioner was a New Hampshire

resident essentially from birth until well after he had passed the bar examination. He has thus fulfilled the residency requirement and should not be deprived of the right to be admitted on account of the fact that he subsequently became a California resident.

II. Time Requirement

Petitioner believes he has been denied his federal rights to due process and equal protection by the Court's ruling that too much time elapsed between his having passed the bar examination and his request to take the oaths. As was established in Mr. Shovan's Affidavit, the Court's policy in 1961 was that an applicant who had successfully passed the bar examination could return at any time

to take the oaths and be admitted, so long as he was a New Hampshire resident. Mr. Drociak attempted to take the oaths in 1962; however, he was discouraged when Mr. Shovan told him that he could not be sworn in unless he was a New Hampshire resident, which he was not at the time.

Based upon Mr. Shovan's assurance that he could take the oaths at any time and the perception that he had to be a New Hampshire resident, petitioner waited until September 1977 to again request admission. However, some time during this period the Court apparently changed its policy to require that one be sworn in within "several years" after passing the bar examination. Petitioner was never informed of this change nor of the

consequences if he failed to take the oaths within a certain number of years. Nor was he ever informed of the reasons for such a policy change. In April 1980 the Court published its amendment to Rule 42 to require that the oaths be taken within two years after passing the examination. Petitioner first learned of the change in policy around this time. Without any prior notice petitioner was thereby informed that his right to take the oaths was precluded.

Even if he had had prior notice of the change in policy, which he did not, the requirement that he be sworn in within "several years" would have been so vague as to prevent any reasonable person from determining the time limit within

which to take the oaths.

****

Petitioner respectfully requests that the Court in its reconsideration review the comments above in addition to matter previously submitted.

We look forward to hearing from you. If the Court reaffirms its ruling, we would appreciate the opportunity to submit a proposed Stipulation of Facts.

Thank you again for your attention in this matter.

Very truly yours,

[Jon Groetzinger, Jr.]

Jon Groetzinger, Jr.

[Michael G. Gfroerer MGG/JGJ]

Michael G. Gfroerer

Attorneys for Petitioner

JGJ/ld

cc: Joseph L. Drociak, Esq.

The Honorable George O. Shovan

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#14

[Letterhead of Joseph L. Drociak]

March 14, 1985

Ralph H. Wood, Clerk of Court

New Hampshire Supreme Court

Supreme Court Building

Concord, New Hampshire 03301

Dear Mr. Wood:

I would like to request the opportunity to take the oath to be admitted as a member of the New Hampshire Bar.

As you may recall, I have previously made such a request on several occasions,

having passed the Bar exam and having met the other admission requirements. I was told initially in 1961 and then several times thereafter that I had to be a New Hampshire resident in order to take the oath of admission.

In light of the March 4, 1985 decision of the United States Supreme Court in Piper vs. State of New Hampshire, it appears that the New Hampshire Supreme Court's initial and subsequent denials of my request based on a lack of New Hampshire residency were unconstitutional.

I respectfully request the opportunity to exercise now the right to take the oath which I had in 1961, but was prevented from exercising.

Thank you for examining this matter, I look forward to hearing from you.

Respectfully submitted,

Joseph L. Drociak

JLD/at

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#15

[Letterhead of Joseph L. Drociak]

April 24, 1985

Ralph H. Wood, Clerk of Court
New Hampshire Supreme Court
Supreme Court Building
Concord, New Hampshire 03301

Dear Miss Bills:

Thank you for yours of March 22, 1985.

You indicated that under Rule 42(8) the oath of admission must be

administered within 2 years after the date an applicant passes the bar examination.

Your statement is currently correct, however, I respectfully request that the Court take notice of the following facts, namely that the prior court clerk, George Shovan, stated to me that there was no time limit within which to take the oath of admission (see my prior pleadings), further that all of my requests to take the oath of admission in 1962, 1977 and again in 1979 pre-dated the 1980 two year requirement under rule 42(8).

Consequently I feel it would be unjust to apply the 2 year rule at this time to preclude my taking the oath of admission.

Thank you for your consideration of this matter.

Respectfully submitted,

Joseph L. Drociak

JLD/at

****

#16

[The State of New Hampshire

Supreme Court]

May 27, 1985

Joseph L. Drociak, Esquire

7627 South Western Avenue

Los Angeles, California 90047

Dear Mr. Drociak:

I would like to respond to your letters of March 14, 1985 and April 24, 1985.

In light of the Piper decision, the

Court has just adopted a special policy which relates to the admission of certain persons previously denied admission because of non-residency. A copy of the Statement of Policy is enclosed.

As you will see, the policy applies only to persons who have passed the bar examination given in July, 1973, or thereafter (the examinations previous to that not having been comparable in form or content to the present examination). Those persons will not be required to retake the bar examination, but they must reapply and otherwise generally meet current requirements for admission.

Very truly yours,

Ralph H. Wood

RHW:dab

Enclosure

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#17

SUPREME COURT NOTICE

The Supreme Court has adopted the following policy regarding admission of bar applicants previously denied admission to the New Hampshire Bar solely because of the residency requirement:

Statement of Policy

During the period of two years from the date hereof, the Supreme Court will grant applications for admission to the Bar filed by those previously denied admission solely because they failed to fulfill the residency requirement of prior Rule 42, if

a. The applicant received a passing score on a New Hampshire bar

examination (including the essay and multistate portions) comparable in form and content to the present examinations, i.e., bar examinations given on July 25 and 26, 1973, or thereafter;

b. The applicant has passed the Multistate Professional Responsibility Examination, provided that an applicant who satisfied condition (a) prior to January 1, 1981, shall not be required to satisfy this condition; and

c. The Committee on Character and Fitness reports favorably on the Applicant.

May 13, 1985

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#18

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. SMC-85-006 Request for Admission to the Bar Joseph L. Drociak, the Court upon March 28, 1986, made the following order:

By motion filed on December 16, 1985, petitioner requests admission to the New Hampshire Bar on the basis of his having taken and passed the New Hampshire bar examination given in 1961. The motion is denied.

Following the United States Supreme Court's decision in Supreme Court of N.H. v. Piper, 105 S.Ct. 1272 (1985), this Court adopted a policy that permitted the admission of persons who has passed one

of the bar examinations given in July 1973 or subsequently but had been denied admission on the ground of non-residency. In arguing that the policy's 1973 cut-off should not be applied to him, petitioner misconceives the reason for the cut-off. That date was selected because the nature of the examination changed significantly at that time, when the multi-state examination was first required, and because this Court concluded that competency to practice law was better measured by the examination given after that date.

Ralph H. Wood,

Clerk

****

#19

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. SMC-85-006

Joseph L. Drociak, Appellant

v.

Supreme Court of New Hampshire, Appellee

Notice of Appeal to the

Supreme Court of the United States

Notice is hereby given that Joseph L. Drociak, the appellant named above, hereby appeals to the Supreme Court of the United States from the final order of the New Hampshire Supreme Court denying the appellant's request for admission to the New Hampshire bar pursuant to a Supreme Court Order adopted May 13, 1985 and promulgated under R.S.A. ch. 311 and

Supreme Court Rule 42, entered herein on March 28, 1986.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

Joseph L. Drociak

By his Attorneys

ORR AND RENO, P.A.

One Eagle Square

P. O. Box 709

Concord, New Hampshire 03301

(603) 224-2383

Dated: June 18, 1986

By_____

Charles F. Leahy

CERTIFICATE OF SERVICE

I, Charles F. Leahy, hereby certify that I have caused a copy of this Notice of Appeal to be hand-delivered to the

Clerk of the Supreme Court of New Hampshire this 18th day of June, 1986.

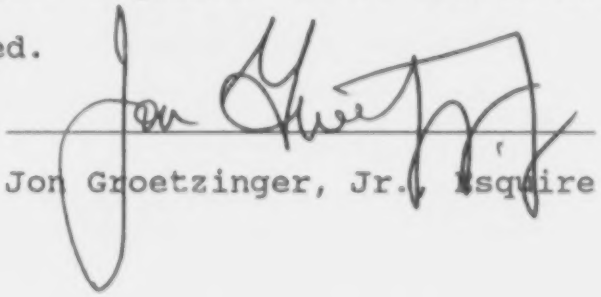
_____

Charles F. Leahy

The above Notice of Appeal to the Supreme Court of the United States and Certificate of Service were filed with the Supreme Court of New Hampshire on June 18, 1986.

CERTIFICATE OF SERVICE

It is hereby certified that on July 3, 1986, three copies of the Jurisdictional Statement of Joseph L. Drociak were served by first class mail on Ralph H. Wood, Clerk of Court, New Hampshire Supreme Court, Supreme Court Building, Concord, New Hampshire 03301. All parties required to be served have been served.



Jon Groetzinger, Jr., Esquire

Supreme Court, U.S.
FILED
AUG 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2170

In The

Supreme Court of the United States

October Term, 1985

—o—

JOSEPH L. DROCIAK,

Appellant,

v.

SUPREME COURT OF NEW HAMPSHIRE,

Appellee.

—o—

On Appeal from the Supreme Court of New Hampshire

—o—

MOTION TO DISMISS OR AFFIRM

—o—

SUPREME COURT OF NEW HAMPSHIRE

By its attorneys,
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Attorney General

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August 5, 1986

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No. 85-2170

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

JOSEPH L. DROCIAK,

Appellant,

v.

SUPREME COURT OF NEW HAMPSHIRE,

Appellee.

—o—

On Appeal from the Supreme Court of New Hampshire

—o—

MOTION TO DISMISS OR AFFIRM

—o—

The State of New Hampshire, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully moves to dismiss or affirm the final judgment of the Supreme Court of the State of New Hampshire in this case on the ground that the question is so unsubstantial as not to warrant further argument.

—o—

RULE INVOLVED

New Hampshire Supreme Court Rule 42(8) provides: "Except upon approval of the Supreme Court for good cause shown, the oath of admission required by RSA 311:6 must be administered within two (2) years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed."

STATEMENT

This is an appeal pursuant to 28 U.S.C. § 1257 from the final order of the New Hampshire Supreme Court, dated March 28, 1986, denying appellant's motion for admission to the New Hampshire bar.

In 1961, appellant took and passed the New Hampshire bar examination. He was not admitted to the bar, however, because he did not meet New Hampshire's residency requirement then in effect. On October 12, 1979, appellant filed a Motion to Take Oaths, which he amended on February 22, 1980 by supplementary memorandum. On May 22, 1980, the New Hampshire Supreme Court denied the motion, stating that it "does not approve requests to take the oath of admission where several years have intervened between passing the bar examination and the time an applicant wishes to take the oath." Appellant's *Jurisdictional Statement*, Appendix 4. After failing to gain reconsideration, appellant appealed to this Court. *Drociak v. Supreme Court of New Hampshire*, No. 80-806 (U.S.

Supreme Court). This Court dismissed the appeal, and treating the appeal as a petition for writ of certiorari, denied certiorari.

In 1980, the New Hampshire Supreme Court amended its rules to provide that "[e]xcept upon approval of the supreme court for good cause shown, the oath of admission required by RSA 311:6 must be administered within two years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed." N.H. Supreme Court Rule 42(8).

On March 4, 1985, this Court held unconstitutional New Hampshire's residency requirement for admission to the bar. *Supreme Court of New Hampshire v. Piper,* 470 U.S. ——, 84 L.Ed.2d 205 (1985). In response to that decision, the New Hampshire Supreme Court adopted a special policy providing an exception to the requirements of Rule 42(8) for bar applicants who had previously been denied admission solely because of the residency requirement. Such an applicant may be admitted without the need to again pass the bar examination if the applicant received a passing score on a previous New Hampshire bar examination comparable in form and content to the present examinations. Appellant's *Jurisdictional Statement,* Appendix 17. New Hampshire began including the multistate examination as part of its bar examination in July, 1973. Thus, applicants who successfully passed New Hampshire's bar examination after July, 1973, need not take the bar examination again in order to be admitted to New Hampshire's bar. Applicants who passed New Hampshire's bar examination prior to July, 1973, are not foreclosed from being admitted to the bar; they are simply

required either to demonstrate the appropriate level of competence by passing the current bar examination, or demonstrate good cause for a waiver under Rule 42(8).

In 1985, appellant filed a motion for admission to the bar of New Hampshire, accompanied by a memorandum in support thereof. *Request for Admission to the Bar of Joseph L. Drociak,* SMC-85-006 (N.H.). In his motion, appellant requests that the New Hampshire Supreme Court make an exception to Rule 42(8) and the special policy on the grounds that he grew up in New Hampshire and has family there.[1] Appellant also challenges the constitutionality of the special policy on the grounds that the July, 1973 cut-off violates his rights to equal protection and due process.[2] In his prayer for relief, appellant requested specifically either that an exception be made to the special policy for him, or that the New Hampshire Supreme Court amend the policy so as to allow petitioner to be admitted to the bar. Appellant further requested that New Hampshire's highest court either hold a hearing on his motion "or otherwise explain the rational relationship between the Policy and State objectives . . . ." *Motion to be Admitted to New Hampshire Bar* (reproduced as Appendix 1).

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[1] Appellant took up residence in California in 1961, and has not been a resident of New Hampshire since. Appellant's *Jurisdictional Statement* at 7.

[2] Appellant argued in his motion to the New Hampshire Supreme Court that issuance of the special policy without prior notice to him violated his right to due process. Appellant does not raise that issue on appeal to this Court. Instead, appellant contends in his appeal to this Court that the failure of the New Hampshire Supreme Court to hold a hearing upon his motion for admission violated his right to due process.

By order dated March 28, 1986, the New Hampshire Supreme Court denied the motion without a hearing. The court responded to the request that it explain the reason for the July, 1973 cut-off date; it stated that the multi-state examination was first required then, and the court concluded that competency to practice law was better measured by the examinations given after July, 1973. Appellant's *Jurisdictional Statement*, Appendix 18.

Appellant filed this appeal on June 24, 1986. Appellant's first Jurisdictional Statement was received by appellees on June 26, 1986. Appellant's revised Jurisdictional Statement was received by appellees on July 7, 1986. Accordingly, this motion to dismiss or affirm is timely if mailed within thirty (30) days of July 7, 1986. Supreme Court Rules 16.1 & 28.2.

———o———

ARGUMENT

I. Appellant Properly Invokes this Court's Appellate Jurisdiction Under 28 U.S.C. § 1257.

Appellant correctly asserts in his jurisdictional statement that this proceeding is an appeal brought under 28 U.S.C. § 1257. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485-86 (1983), this Court held that review by appeal properly lies from a final state court order denying a particular application for admission to the bar, even if the challenge alleges that the State Court's action was unconstitutional. When the state court acts in a judicial capacity, review of its decision may be had only in the United States Supreme Court. *See Id.*

There can be no doubt that the New Hampshire Supreme Court acted in its judicial capacity in denying appellant's motion for admission to the bar. Appellant sought and received a declaration of his rights as they stood, made against the background of existing rules. His motion set forth factual allegations concerning his ties to New Hampshire and his alleged unique situation. Legal arguments were presented both in his motion and accompanying memorandum. The New Hampshire Supreme Court assigned a docket number to petitioner's case, considered the pleadings and disposed of the case by issuance of an order. By its order denying the motion, the New Hampshire Supreme Court adjudicated appellant's "claim of a present right to admission to the bar." *In re Summers,* 325 U.S. 561, 568 (1945). "This is the essence of a judicial proceeding." *Feldman,* 460 U.S. at 481.

Appellant's arguments on appeal do not constitute general challenges to state bar admission rules, which may properly be raised in the United States District Courts. Appellant sought, but did not receive, an exception from Rule 42(8)'s requirement that the oath of admission be taken within two (2) years after passing the bar examination. Clearly, his arguments for an exception based upon his special ties to New Hampshire can only be reviewed on appeal to this Court. *Feldman,* 460 U.S. at 486-87. Similarly, his due process argument regarding the lack of a hearing below is not a general challenge to a state bar admission rule, and is reviewable only in this Court. *See Doe v. Pringle,* 550 F.2d 596 (10th Cir. 1976) (federal district court was without subject matter jurisdiction to review final state court order denying application for admission to bar, where one issue raised was due process challenge to failure to hold hearing).

Appellant's final argument concerning the constitutionality of the special policy should also be treated as a denial of his particular application for admission, even though "the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights." *Doe v. Pringle*, 550 F.2d at 599 (quoted in *Feldman*, 460 U.S. at 485). The special policy at issue in effect simply sets forth a declaration by the New Hampshire Supreme Court that certain qualified bar applicants who did not take the oath of admission within two (2) years of passing the bar examination solely because of the residency requirement will meet the "good cause" exception to New Hampshire Supreme Court Rule 42(8). The special policy does not *prohibit* any applicant from being admitted to the New Hampshire bar. An applicant who does not fall within its permissive scope is not thereby automatically precluded from admission—he may apply for waiver of the two-year requirement in Rule 42(8) by seeking "approval of the Supreme Court for good cause shown . . . ." New Hampshire Supreme Court Rule 42(8). By denying his motion for admission, the New Hampshire Supreme Court simply found that appellant failed to demonstrate good cause for waiving the two-year requirement of Rule 42(8). Such a determination is reviewable only by appeal to this Court.[3]

---

[3] Appellant's request for relief below demonstrates his understanding that his motion is not a general challenge to the State rules. Appellant requested not that the lower Court strike down its special policy, but rather, that the policy be amended so as to *include* him. A successful challenge to the policy alone would be of little assistance to appellant. The result would be to require all affected applicants to apply for a waiver of Rule 42(8). There is no reason to believe that appellant's request for a waiver of Rule 42(8)'s two-year requirement would be treated any differently if the special policy for post-1973 examinees were struck down.

II. The Questions Presented on Appeal Are Unsubstantial and Do Not Warrant Further Argument.

The issues raised in this appeal are unsubstantial. The decision below is correct on the merits; the issues themselves are of little importance.

In response to this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. —. 84 L.Ed.2d 205 (1985), the New Hampshire Supreme Court issued a special policy that, in effect, declared that applicants to the New Hampshire bar who had passed a New Hampshire bar examination comparable in form and content to examinations currently given, but who had been denied admission solely because of the residency requirement, would qualify for a waiver of New Hampshire Supreme Court Rule 42(8)'s requirement that an applicant take the oath of admission within two (2) years after passing the bar examination. This policy permits successful examinees from July, 1973 and after to be admitted without re-taking the bar examination. The policy is permissive; it does not prohibit applicants who passed earlier bar examinations from being admitted. Such applicants can be admitted to New Hampshire's bar either by demonstrating good cause for a waiver of Rule 42(8)'s two-year requirement, or by passing the bar examination in its current form. In this case, the New Hampshire Supreme Court's order of March 28, 1986, simply determined that appellant failed to demonstrate good cause for a waiver of New Hampshire Supreme Court Rule 42(8)'s requirement that an applicant take the oath of admission within two (2) years after passing the bar examination. Approximately a quarter-century had passed between the time appellant took the bar examination and his proposed date for taking the oath. During that interim,

the New Hampshire Supreme Court had significantly changed the form and content of the bar examination in order to better measure the competency of applicants to the bar.[4] Given the substantial interest New Hampshire has in regulating the practice of law within its borders, *Sperry v. State of Florida*, 373 U.S. 379 (1963), the lower court's decision not to waive Rule 42(8) in this case should be upheld on the merits.

Appellant argues that the lower court's policy of granting applications for admission by applicants who passed the bar examination in or after July, 1973, violates his right to equal protection. Appellant contends that the lower court's action is subject to "strict scrutiny."[5]

It should again be noted that the New Hampshire Supreme Court has not foreclosed appellant forever from gaining admission to the bar of New Hampshire. The decision simply requires that appellant demonstrate his competence by passing the New Hampshire bar examination.

---

[4] "The legitimate authority of the State to impose reasonable admissions requirements surely encompasses the prerogative to make reasonable amendments to such requirements, as these become warranted by the changing conditions of the profession." *Moity v. Louisiana State Bar Association*, 414 F.Supp. 176, 178 (E.D.La.) *on remand* 414 F.Supp. 180, *affd.* 537 F.2d 1141 (5th Cir. 1976). *See Dent v. State of West Virginia*, 129 U.S. 114, 123 (1889). The legitimate authority of a state to require high standards of qualification before it admits an applicant to the bar, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), must just as surely encompass the prerogative to improve the methods of testing those qualifications when better methods become available.

[5] Application of this standard is argued for the first time on appeal. Appellant argued in his memorandum below that the "rational connection" test applied.

> A State can require high standards of qualification, such as . . . proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). It has been held that bar examinations have a rational connection with the applicant's fitness or capacity to practice law. *See e.g., Poats v. Givan,* 651 F.2d 495, 497 (7th Cir. 1981); *Chaney v. State Bar of California,* 386 F.2d 962, 964 (9th Cir. 1967) *cert. denied,* 390 U.S. 1011 (1968). Moreover, New Hampshire has the right to change its admission requirements and its means of testing an applicant's fitness. *See* note 4 *supra.* In 1973, New Hampshire made such a change, requiring applicants for admission to the bar to pass the multistate examination.

Appellant's argument thus becomes the following: for the purpose of deciding whether good cause exists to waive Rule 42(8), the State has no rational basis upon which to distinguish appellant, who has never passed a bar examination comparable to the bar examination now required for admission and whose competency to practice law was measured by a New Hampshire bar examination given twenty-five (25) years ago, from applicants who have passed a bar examination comparable to the bar examination now given and who have done so since 1973. This argument is without merit. In determining whether to waive the two-year requirement of Rule 42(8), the New Hampshire Supreme Court was entitled to consider not only the reasons for the delay between passing the bar examination and taking the oath, but other factors such as the length of that delay, the content of the bar examination taken, etc. More-

over, the effect of the lower court's refusal to waive Rule 42(8) is not to bar forever the applicant from admission, but merely to require him to demonstrate competence by passing the bar examination in its current form. Appellant has failed to demonstrate any violation of the equal protection clause.[6]

Appellant's due process claim is no more substantial. Appellant argues that the New Hampshire Supreme Court's failure to grant a full hearing on his motion violated due process. The simple response is that appellant did not unconditionally request such a hearing. The relief sought in his motion was that the court hold a hearing or otherwise explain the rational relationship between the special policy and state objectives. In its order, the court did the latter. Thus, appellant cannot complain that he did not receive a hearing when the court gave him the alternative that he requested.

In addition, assuming appellant was entitled to procedural due process, he was not automatically entitled to a hearing. Appellant's reliance upon *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963) is misplaced. Here, appellant seeks to extend the New Hampshire Supreme Court's already generous special policy from appli-

---

[6] Appellant's argument that other available alternatives exist by which New Hampshire can determine the competency of appellant to practice law presupposes that strict scrutiny is the appropriate standard of review in this case. As stated in *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), the appropriate test is the rational relationship test. Under that test, the State need not show that no other available alternatives exist, but merely that the means chosen by the State are reasonable. *See Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975), *cert. denied* 426 U.S. 940 (1976).

cants who passed the 1973 bar examination back to a 1961 examinee. The interests involved in determining whether to so extend the special policy or otherwise waive the two-year requirement in Rule 42(8) are entirely different from those involved when an individual is denied admission to the bar on the ground of moral unfitness, as in *Willner. See Tyler v. Vickery,* 517 F.2d 1089, 1104 (5th Cir. 1975) *cert denied* 426 U.S. 940 (1976). Here, appellant presented the salient facts and his legal arguments in his motion and memorandum. Accepting the factual allegations as true, the New Hampshire Supreme Court considered appellant's arguments and denied his motion for admission. Appellant has made no argument or showing that a hearing would have in any way reduced the risk of an erroneous decision in this case. *See Mathews v. Eldridge,* 424 U.S. 319, 343-45 (1976). Thus, appellant has failed to demonstrate a due process violation.

Finally, this Court should dismiss this appeal because the issues raised are of little significance. Essentially, appellant seeks to have the United States Supreme Court give plenary consideration to the question of whether appellant must take a bar examination. The decision below does not find appellant unqualified or unfit to practice law; it simply requires him to demonstrate competence by passing the current bar examination in order to gain admission to the bar of New Hampshire. Appellant's interest in avoiding taking the bar examination is minimal. Indeed, several cases have held that a failing examinee has no due process right to a hearing to review his grades precisely because the applicant has the right to retake the examination. *See Tyler v. Vickery,* 517 F.2d at 1103-05; *Whitfield v. Illinois Board of Law Examiners,* 504 F.2d 474, 478,

(7th Cir. 1974). Clearly, these cases recognize that an applicant's interest in avoiding the actual taking of the bar examination is of little importance.

Nor is a decision in this case likely to have a widespread impact. Appellant conceded below that he is part of "what must be a small class of attorneys who took and passed the examination prior to July, 1973, but were denied admission because they were not New Hampshire residents." Appendix 1 at Paragraph 16. It seems unlikely that a decision in this case would affect anyone other than what must be a very small class of attorneys presumably residing in and practicing law in other states.

———o———

CONCLUSION

For the foregoing reasons, this appeal should be affirmed or dismissed for failure to present a substantial question.

Respectfully submitted,

SUPREME COURT OF NEW HAMPSHIRE

By its attorneys,
STEPHEN E. MERRILL
Attorney General

DOUGLAS NOYES JONES
Assistant Attorney General
Counsel of Record

DAVID S. PECK
Assistant Attorney General
Civil Bureau
25 Capitol Street
Concord, New Hampshire 03301
(603) 271-3658

August 5, 1986

APPENDIX I

IN THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

In Re Joseph L. Drociak No. 85-————

MOTION TO BE ADMITTED TO
NEW HAMPSHIRE BAR

NOW COMES Petitioner, Joseph L. Drociak, by his attorney, and says that:

1. Joseph L. Drociak has been and is a member in good standing of the California bar since 1964.

BACKGROUND.

2. Having taken and passed the New Hampshire bar examination in 1961, Joseph L. Drociak has on several occasions between 1962 and 1980 petitioned this Court to take the oath of office and be admitted to the New Hampshire bar.

3. Each time this Court denied his request, first because he was not a New Hampshire resident, then because several years had elapsed between passing the examination and requesting to take the oath of admission. (See No. 79-323 (S. Ct. of New Hampshire) *In re Joseph L. Drociak*). In all other respects Mr. Drociak has fulfilled New Hampshire's admission requirements.

4. Mr. Drociak filed a Notice of Appeal of this Court's prior rulings to the United States Supreme Court on 13 November 1980. Mr. Drociak contended that the residency requirement violated the privileges and immunities clause and his rights to equal protection and due process under the Fourteenth Amendment to the U.S.

Constitution. He further argued that his rights to due process were violated by this Court's failure to notify him that the passage of several years between passing the bar examination and requesting to take the oath would bar him from admission.

5. The United States Supreme Court did not take Mr. Drociak's appeal, but shortly thereafter heard the case of *S. Ct. of New Hampshire v. Piper,* 470 US —, 84 L Ed 2d 205, 106 S Ct — (Decided March 4, 1985) which was based on similar facts. The *Piper* case held the New Hampshire bar residency requirement violative of the privileges and immunity clause of the U.S. Constitution.

6. Shortly after the *Piper* decision, Mr. Drociak sent this Court a letter, dated 14 March 1985 (See Exhibit 1), again requesting to take the oath to be admitted to the New Hampshire bar.

7. By letter dated 22 March 1985 (see Exhibit 2), the Clerk's office notified Mr. Drociak that it did not know whether he would need to retake the bar examination in order to be admitted since under Rule 42(8) more than two years had elapsed between passing the bar examination and requesting to take the oath of admission (hereinafter the "Two-Year Requirement").

8. On 28 March 1985 the Court amended its Rule 42 to delete the bar residency requirement in accordance with the *Piper* decision.

9. On 24 April, 1985, Mr. Drociak again wrote the Court (see Exhibit 3) and noted that his prior requests for admission in 1962, 1977 and 1979 all predated the 1980

Two-Year Requirement. To apply it to him at this time would be unjust.

10. By letter of 27 May 1985, Clerk Ralph H. Wood enclosed a new policy dated 13 May 1985 (hereinafter the "Policy"), adopted in light of the *Piper* decision (See Exhibit 4). The Policy allowed bar applicants who had taken the bar examinations in July 1973 and thereafter and who had previously been denied admission solely because of the residency requirement to apply for admission without having to retake the bar examination.

11. Mr. Drociak responded by letter of 20 June 1985 (see Exhibit 5) asking: 1. Whether the Policy allowed for his admission without having to retake the examination; 2. If not, the basis on which those who took the examination prior to July 1973 should be ineligible; and 3. Would the Court consider an exception to the Policy and allow Mr. Drociak to be admitted.

12. By letter of 1 August 1985 (see Exhibit 6) Mr. Wood stated that Mr. Drociak's first two questions were answered by Mr. Wood's 27 May 1985 letter and that a formal pleading would be necessary to request an exception to the policy.

13. Mr. Drociak presumes from Mr. Wood's 1 August 1985 letter that under the Policy Mr. Drociak would be required to retake the examination. Further, his having passed the pre-July 1973 examination does make him ineligible for admission since it was not comparable to the examination given in July 1973 and thereafter.

14. This Motion presents different issues from those in prior pleadings. Mr. Drociak's prior pleadings before

this Court and on appeal to the U.S. Supreme Court challenged the constitutionality of the bar residency requirement and the denial of due process in this Court's failure to notify him of the policy precluding admission where several years had elapsed between passing the examination and requesting to take the oath. The grounds for this Motion arise directly out of the issuance of the Policy, and were not and could not have been raised, heard or decided in such prior pleadings.

REQUEST FOR POLICY EXCEPTION/
CONSTITUTIONAL CHALLENGE

15. Retaking the New Hampshire bar examination would present a considerable financial and practical hardship for Mr. Drociak. Consequently, this Motion is filed in accordance with Mr. Wood's suggestion to apply for an exception to the Policy.

16. The Petitioner requests that the Court make an exception to the Policy and allow Mr. Drociak to be admitted without retaking the bar examination because Mr. Drociak's situation is unique. He is in what must be a small class of attorneys who took and passed the examination prior to July, 1973, but were denied admission because they were not New Hampshire residents. However, perhaps unlike other non-residents in this class, he grew up and has family in New Hampshire, and knows of New Hampshire laws and customs. Allowing an exception should not substantially burden the administration of justice, constitute a bad precedent, or result in a deluge of applications since there are probably so few similarly situated attorneys.

17. Alternatively to requesting that the Court make an exception to the Policy for him, Mr. Drociak challenges the Policy's constitutionality, both on its face and as applied to him. It denies him of his rights to due process and equal protection of the law under the New Hampshire Constitution and the Fourteenth Amendment to the U.S. Constitution in that:

> i.) There is no rational relationship between (a) the policy of dividing attorneys who have passed the New Hampshire bar into those who took the bar examination prior to July 1973 and those who took it in July 1973 and thereafter; and (b) legitimate State objectives of ensuring a bar of competence and good moral character.
>
> The Court noted in the Policy that the examinations since July 1973 (hereinafter the "Multistate Exam") are comparable to the current examination. By implication the examinations prior to July 1973 (hereinafter the "New Hampshire Exam") are not.
>
> Petitioner asks what is the relevance of such a distinction? Applicants who took the exam in July 1973 (more than 12 years ago) are as unlikely as those who took the prior New Hampshire Exam to remember anything about the exam or their studies for it. Consequently, they are certainly no more qualified to practice in New Hampshire than attorneys in Mr. Drociak category who took the New Hampshire Exam. In fact, if one believes applicants can actually recall the legal knowledge they needed to pass either the New Hampshire or Multistate Exam which they took more than 12 years ago, much of it would certainly be out of date in today's practice. Further, the applicant who took the New Hampshire Exam would be more knowledgeable of New Hampshire law and practice than those who took the Multistate Exam which was more oriented to "black-letter", non-New Hampshire legal knowledge.

ii.) The Court has arbitrarily made an exception to the Two-Year Requirement so as to benefit attorneys similarly situated to the Petitioner, but not the Petitioner. The rationale of the Two-Year Requirement appears to have been to ensure that only attorneys with recent knowledge of New Hampshire law be admitted. Under the Policy the Court arbitrarily ignored the Two-Year Requirement rationale to Petitioner's detriment in allowing attorneys who took the bar examination *twelve years* earlier to be admitted without retaking the examination.

iii.) Under the Policy the Court has treated non-resident attorneys who took and passed the New Hampshire Exam differently from similarly situated resident attorneys. The Policy requires that out-of-state attorneys who passed the New Hampshire Exam take a new examination. Resident attorneys who passed the New Hampshire Exam are under no such requirement.

If the State's objective is to protect the public from the rusty memories of those attorneys who passed the New Hampshire Exam prior to July 1973, would it not make more sense to require that all attorneys who took the New Hampshire Exam (both residents and non-residents) take continuing legal education courses in prescribed areas?

iv.) Neither the Petitioner nor to his knowledge other attorneys were given an opportunity to learn of or comment on the Policy prior to its issuance, despite the fact that it materially and adversely affected his fundamental right to practice law in New Hampshire.

18. The Petitioner is at a loss in understanding the Court's treatment of his numerous requests for admission. Until issuance of the Policy the Court had turned down his admission requests because: (a) he was not a New Hampshire resident; and (b) several (now defined

as more than two) years had elapsed between passing the bar examination and requesting to take the oath of office. *Piper* struck down the non-residency ground. And in admitting without reexamination attorneys who had taken the bar examination up to twelve years before, this Court has emasculated the rationale of the Two-Year Requirement. Now the Court has set forth another ground which excludes Mr. Drociak from the New Hampshire bar—that he took and passed the bar examination prior to July 1973. The relevance of this fact is not apparent. No rational connection seems to exist between the Policy and the State's objectives of ensuring that its bar is morally fit and competent to practice law.

WHEREFORE, Mr. Drociak prays that:

A. The Court make an exception to the Policy and allow Mr. Drociak to be admitted to the New Hampshire bar;

B. If it is unable to make an exception to the Policy, the Court reconsider the constitutionality of the Policy, both on its face and as applied to Mr. Drociak, and amend it so as to allow Mr. Drociak to be admitted to the New Hampshire bar;

C. The Court hold a hearing on this Motion or otherwise explain the rational relationship between the Policy and State objectives; and

D. The Court grant such further relief as may be just.

Respectfully submitted,

JOSEPH L. DROCIAK
By his attorney,

/s/ Jon Groetzinger, Jr.
7302 Pomander Lane
Chevy Chase, MD 20815
(301) 897-6734 or
(301) 986-1675

Dated: 11 December 1985

EXHIBIT 1

(213) 971-3981

Law Offices of
JOSEPH L. DROCIAK
7627 So. Western Ave.
Los Angeles, Calif. 90047

March 14, 1985

Ralph H. Wood, Clerk of Court
New Hampshire Supreme Court
Supreme Court Building
Concord, New Hampshire 03301

Dear Mr. Wood:

I would like to request the opportunity to take the oath to be admitted as a member of the New Hampshire Bar.

As you may recall, I have previously made such a request on several occasions, having passed the Bar exam and having met the other admission requirements. I was told initially in 1961 and then several times thereafter that I had to be a New Hampshire resident in order to take the oath of admission.

In light of the March 4, 1985 decision of the United States Supreme Court in Piper vs. State of New Hampshire, it appears that the New Hampshire Supreme Court's initial and subsequent denials of my request based on a lack of New Hampshire residency were unconstitutional.

I respectfully request the opportunity to exercise now the right to take the oath which I had in 1961, but was prevented from exercising.

Thank you for examining this matter, I look forward to hearing from you.

Respectfully Submitted,

/s/ JOSEPH L. DROCIAK

JLD/at

EXHIBIT 2

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Ralph H. Wood
Clerk Of Court And
Reporter Of Decisions
Carol A. Belmain
Deputy Clerk

Frank Rowe Kenison
Supreme Court Building
CONCORD, N.H. 03301
(603) 271-2646

March 22, 1985

Joseph L. Drociak, Esq.
7627 South Western Avenue
Los Angeles California 90047

Dear Mr. Drociak

I have received your letter of March 14, 1985 requesting to be admitted to the New Hampshire Bar. The Supreme Court has until March 29, 1985 to file a Petition for Rehearing and when I know the final outcome, I will let you know. Since it has been twenty four years since you have taken and passed the bar exam, I do not yet know whether you will be eligible to be admitted without taking the exam again. According to Rule 42(8), the oath of admission must be administered within two years from the time the applicant has been notified of the successful passing of the bar examination or said examination must be taken again and passed. I will be getting back to you as soon as the court has made its final decisions. If you have any questions, please don't hesitate to call.

Very truly yours,

/s/ Deborah A. Bills
Office of the Clerk

EXHIBIT 3

Law Offices of
JOSEPH L. DROCIAK
7627 So. Western Ave.
Los Angeles, Calif. 90047

April 24, 1985

Ralph H. Wood, Clerk of Court
New Hampshire Supreme Court
Supreme Court Building
Concord, New Hampshire 03301

Dear Miss Bills:

Thank you for yours of March 22, 1985.

You indicated that under rule 42(8) the oath of admission must be administered within 2 years after the date an applicant passes the bar examination.

Your statement is currently correct, however, I respectfully request that the Court take notice of the following facts, namely that the prior court clerk, George Shovan, stated to me that there was no time limit within which to take the oath of admission (see my prior pleadings), further that all of my requests to take the oath of admission in 1962, 1977 and again in 1979 pre-dated the 1980 two year oath requirement under rule 42(8).

Consequently I feel it would be unjust to apply the 2 year rule at this time to preclude my taking the oath of admission.

Thank you for your consideration of this matter.

Respectfully submitted,
JOSEPH L. DROCIAK

JLD/at

EXHIBIT 4

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Ralph H. Wood
Clerk of Court and
Reporter of Decisions
Carol A. Belmain
Deputy Clerk

Frank Rowe Kenison
Supreme Court Building
Concord, N.H. 03301
(603) 271-2646

May 27, 1985

Joseph L. Drociak, Esquire
7627 South Western Avenue
Los Angeles, California 90047

Dear Mr. Drociak:

I would like to respond to your letters of March 14, 1985 and April 24, 1985.

In light of the *Piper* decision, the Court has just adopted a special policy which relates to the admission of certain persons previously denied admission because of non-residency. A copy of the Statement of Policy is enclosed.

As you will see, the policy applies only to persons who have passed the bar examinations given in July, 1973, or thereafter (the examinations previous to that not having been comparable in form or content to the present examination). Those persons will not be required to retake the bar examination, but they must reapply and otherwise generally meet current requirements for admission.

Very truly yours,

/s/ Ralph H. Wood

RHW:dab
Enclosure

SUPREME COURT NOTICE

The Supreme Court has adopted the following policy regarding admission of bar applicants previously denied admission to the New Hampshire Bar solely because of the residency requirement:

Statement of Policy

During the period of two years from the date hereof, the Supreme Court will grant applications for admission to the Bar filed by those previously denied admission solely because they failed to fulfill the residency requirement of prior Rule 42, if

a. The applicant received a passing score on a New Hampshire bar examination (including the essay and multistate portions) comparable in form and content to the present examinations, i.e., bar examinations given on July 25 and 26, 1973, or thereafter;

b. The applicant has passed the Multistate Professional Responsibility Examination, provided that an applicant who satisfied condition (a) prior to January 1, 1981, shall not be required to satisfy this condition; and

c. The Committee on Character and Fitness reports favorably on the applicant.

May 13, 1985

EXHIBIT 5

June 20, 1985

Ralph H. Wood, Clerk
New Hampshire Supreme Court
Frank Rowe Kenison Supreme Court Building
Concord. N.H. 03301

RE: Joseph L. Drociak Admission to N.H. Bar

Dear Mr. Wood:

Thank you for your letter of May 27, 1985 regarding the Court's Notice of the Statement of Policy on admission of bar applicants who were previously denied admission.

As you are aware, I was denied admission to the New Hampshire bar solely because I failed to fulfill the residency requirement of prior Rule 42.

I would appreciate the Court's clarification as to how the new policy applies to me; specifically:

1. Does the policy allow for my admission to the bar without the necessity of having to take a bar examination again?

2. If not, on what basis has the Court determined that those applicants who successfully took the bar examination prior to July 1973 should not be eligible for admission without retaking the examination?

3. Would the Court consider an exception to the policy in my case, based upon Mr. Shovan's assurance in 1961 that I could be admitted at any time if I established New Hampshire residency?

Thank you for your help in this matter.

Very truly yours,

JOSEPH L. DROCIEK, ESQ.

JLD/at

EXHIBIT 6

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

RALPH H. WOOD
Clerk of Court and
Reporter of Decisions
CAROL A. BELMAIN
Deputy Clerk

FRANK ROWE KENISON
Supreme Court Building
CONCORD, N. H. 03301
(603) 271-2646

August 1, 1985

Joseph Drociak, Esquire
7627 South Western Avenue
Los Angeles, California 90047

Dear Mr. Drociak:

I have your letter of June 20, 1985. In reviewing the contents of my letter to you dated May 27, 1985, I conclude that your first two questions were answered as completely as they can be. As to your third question, I can only respond that a formal pleading would be necessary to bring the matter to the Court's attention.

Very truly yours

/s/ Ralph H. Wood

RHW:dab

IN THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

In Re Joseph L. Drociak No. 85-.....

MEMORANDUM SUPPORTING MOTION TO BE ADMITTED TO THE NEW HAMPSHIRE BAR

This Memorandum is in support of Petitioner's Motion To Be Admitted to the New Hampshire bar, filed the same date as this Memorandum.

Mr. Drociak believes that he has not been treated fairly in his quest to be admitted to the New Hampshire bar. He feels ackward indeed coming again before this Court asking the same question: Why can I not be admitted? However, the answer keeps changing. With each new answer, the greater grows Petitioner's confusion as to the underlying rationale of the Court in precluding his admission. Petitioner therefore pleads that the Court give a thoughtful reconsideration of this matter.

After passing the bar exam in 1961, Petitioner initially requested in 1962 to take the oath. He was turned away because he was not then a New Hampshire resident, but was assured he could take the oath any time he established residency.

When he again applied in 1977, he was again denied admission not only because he was a nonresident, but because contrary to the prior assurance, he had waited too long (later defined as more than two years) between his passing the bar exam and his request to take the oath.

While he believed that the Two Year Requirement had been improperly applied against him without notice, he at least appreciated the apparent rationale of the Court: To

ensure that only those attorneys with reasonably fresh legal knowledge be admitted.

Then came the *Piper* decision, holding the New Hampshire recidency requirement unconstitutional. *Piper* therefore left only the Two Year Requirement standing between Mr. Drociak and admission to the bar. Had the Court not issued its new 13 May 1985 policy ("Policy"), allowing the admission of attorneys who had passed the bar exam up to twelve years earlier, there was still some rational basis on which to deny Mr. Drociak's admission request earlier this year. There was still an apparent connection between the Two Year Requirement and the State's interest in admitting only competent attorneys to the New Hampshire bar.

However, in issuing the Policy, the Court ignored the rationale of the Two Year Requirement, allowing the admission of attorneys with up to twelve years experience, but who were not "fresh" from the bar exam.

Admitting attorneys with experience such as these in lieu of recently passing a bar exam would, of course, have been a reasonable course of action and in conformity with the State's interest in a competent bar.

What was not reasonable was establishing an arbitrary cut-off point between those who passed the July 1973 exam which included the multistate portion ("Multistate Exam") and those who passed the prior New Hampshire oriented exam ("New Hampshire Exam"). The Court alludes in the Policy to the different character of the Multistate Exam from the New Hampshire Exam. But what is the point here? What is the rational connection in discriminating against the New Hampshire Exam applicants and the State's interest in a competent bar?

It strains reason to argue that an attorney who passed the Multistate Exam twelve years ago is any more qualified to practice than an attorney who passed the prior New Hampshire Exam. If a poll were taken of those who took the July 1973 Multistate Exam and those who took the preceding New Hampshire Exam, doubtless very few applicants, if any, in either category would have even the vaguest recollection of the exams, other than remembering the horror of the experience. They would most likely not remember the questions, their answers, or the detailed knowledge they carried with them into the exams.

Even if a few did remember bits and pieces of legal knowledge acquired during their studies for the exam, much of the knowledge would now be outdated and inapplicable to today's New Hampshire practice. Moreover, of the knowledge that was still applicable today, those who took the pre-July 1973 New Hampshire Exam would be more familiar with New Hampshire law and practice since it was a more state-oriented exam than the exams given in July 1973 and thereafter. It would therefore be the attorneys in Mr. Drociak's category who would be the more competent to practice in New Hampshire.

In short, there is nothing that necessarily makes the applicants who took the Multistate Exam any more qualified than those who took the pre-July 1973 exam. Petitioner believes the type of exam applicants took more than a decade ago is irrelevent to their competency to practice in New Hampshire today. Even if one believes the type of exam is relevant, it could be argued that those who took the exam in July 1973 and thereafter are less qualified since they were not as stringently tested in New Hampshire law and practice.

What the Policy really represents is a convenient, clearly defined, but arbitrary distinction between two categories of attorneys. It discriminates against the pre-July 1973 category of which Mr. Drociak is a part, unconstitutionally depriving him of his right to practice law. He meets all other requirements for admission but for his incusion in this category.

Such distinction vioates the United States and New Hampshire Constitution's prohibition on State deprivation of life, liberty or property without equal protection and due process of law.

The right of an attorney to practice his profession has been recognized as a fundamental right, not simply a matter of grace. *Baird v. St. Bar of Arizona,* 401 U.S. 1, at 8, 27 L. ed. 2d 639, at 648, 91 S.Ct. 702, at 707 (1971).

While a State can clearly require high standards of qualification, such as good moral character or proficiency in its laws before it admits an applicant:

> "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment . . . . any qualification must have a rational connection with the applicant's fitness or capacity to practice law . . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." *Schware v. Board of Bar Exam. of State of N.M.,* 353 U.S. 232, at 238-239, 77 S.Ct. 752, at 756 (1957).

The "rational connection" test has until recently been a relatively easy test for a State to meet, compared to its

burden in justifying distinctions based on suspect categories such as race and sex. However, three recent U.S. Supreme Court decisions demonstrate that a State can no longer meet the test as easily. The following cases each applied the "rational connection" test and found the government's actions unconstitutional; *City of Cleburne v. Cleburne Living Center,* 473 U.S. —, 87 L. ed. 2d 313, 105 S.Ct. — (1985), *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. —, 84 L. ed. 2d 751, 106 S.Ct. — (1985), and *Williams v. Vermont,* 472 U.S. —, 86 L. ed. 2d 11, 105 S.Ct. — (1985).

In *Cleburne,* for example, the Cleburne City Council denied an application for a special use permit for a proposed group home for the mentally retarded. In applying the "rational connection" test, the Court reviewed each of the City's proffered justifications for the denial of the permit and concluded the denial was really based on "irrational prejudice."

The important lesson of these cases is that the "rational connection" test has acquired some teeth. As one commentator noted:

> "We've gotten used to the idea that if the test is rational basis, the legislation gets an automatic pass . . . Now rational basis is beginning to mean something." *ABA Journal, October,* 1985, p. 112.

The Court's Policy lacks any rational connection to the State's interest in a competent bar and therefore violates the Petitioner's right to equal protection by arbitrarily discriminating against him.

In addition, the Policy deprives him of his right to due process of law. The issuance of the Policy occurred without notice and without an opportunity to be heard. There

was not even an opportunity given to the members of the bar to comment on the Policy.

This procedure was most peculiar and foreign to the manner in which this Court normally conducts rule and policy changes. Normally the Court affords an opportunity for a hearing, such as the one on 10 December 1985 relating to the proposed changes in the Rules of Professional Conduct (see 12 NHLW 303, November 27, 1985), or at least a chance to submit written comments. The recent formation of the New Hampshire Supreme Court Advisory Committee on Rules indicates the Court's concern with giving notice and an opportunity to be heard on rule changes.

The above rule change hearings and opportunities for comment generally relate to rules that affect existing New Hampshire bar members. Should the procedure, however, be any different for policy changes that substantially affect Petitioner's right to be admitted to the bar? We think not. The Court's Policy impacted the Petitioner's rights much more substantially than other rule changes on which the Court has allowed comment and/or a hearing. In addition, Mr. Drociak has never been given any reasons why his inclusion in the category of those who took the bar exam before July 1973 should preclude his admission.

In applying the two-part analysis of *Appeal of Henry A. Plantier, M.D.*, 12 NHLW 157 (5/23/85), in determining whether the challenged procedures satisfy the due process requirement of the State (and in this case the Federal) Constitution, first there is no doubt that the right to practice law is a legally protected property right. See *Baird* citation above.

Second, the challenged procedures did not offer Mr. Drociak the appropriate legal safeguards: He should have

been entitled to prior notice of the Policy, a full hearing, and the right to be given rational reasons why passing the pre-July 1973 exam should make him incompetent to practice law in New Hampshire. As the U.S. Supreme Court stated in *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 10 L. ed. 2d 224, 83 S.Ct. 1175 (1963) involving the right of an attorney applicant to a hearing after passing the bar exam. but being denied admission:

> "There seems no question but that petitioner was appraised of the matters the Committee was considering.
>
> " 'But a "full hearing"—a fair and open hearing —requires more than that .... Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.' " at 373 U.S. 105, 10 L. ed. 2d 230, 83 S.Ct. 1181.

In conclusion, Petitioner's rights to both equal protection and due process of law have been violated by the Court's Policy of 13 May 1985, and Petitioner respectfully requests that the Court grant the relief prayed for in the attached Motion.

Respectfuly submitted,

JOSEPH L. DROCIAK
By his attorney,

/s/ Jon Groetzinger, Jr.
7302 Pomander Lane
Chevy Chase, MD 20815
(301) 897-6734 or
(301) 986-1675

Dated: 11 December 1985